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The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 98-120

Dear Chairman Powell:

The Association of Public Television Stations, the Corporation for Public Broadcasting, and the Public Broadcasting Service ("Public Television") recently submitted an ex parte letter in the digital must carry proceeding, arguing that the Commission has legal authority to grant noncommercial educational television stations broad digital carriage rights. In particular, Public Television claims that differences in "statutory treatment but also factual, economic and historical differences as well" justify granting public television stations the right to immediate carriage of all free over-the-air multicast PTV digital programming, even if commercial stations do not have these rights.

Public television is unique among broadcasters for its non-commercial public interest programming. Many cable operators, recognizing the value of public television stations' digital program offerings, are voluntarily carrying it today. But there is nothing unique about public television when it comes to statutory rights to mandatory digital carriage. Public Television points to an assortment of distinctions, both legal and factual, between commercial and non-commercial broadcasters. However, none of these distinctions changes the Commission's previous holdings that dual or multicasting must carry obligations would be unlawful for any broadcaster.

Public Television tries to anchor expanded digital carriage rights in "the statutory framework of the Public Broadcasting Act," which it says demonstrates that "it is in the public interest for the Federal Government to ensure that all citizens have access to public television services by all technological means."[1] But this argument is disproved by the very language Public Television quotes. Not all public television services are automatically entitled to carriage by all distribution technologies.

[1] Letter at 1-2.

The unavoidable fact is that cable carriage rights are found not in the Public Broadcasting Act but in the 1992 Cable Act. Section 615 specifically addresses carriage of public television ("PTV") stations.[2] While Section 615 differs in some respects from the commercial must carry provision (Section 614), these distinctions do not amount to the mandate of broad digital carriage rights that Public Television tries to assert.

Rather, the language of Section 615 supports the FCC's determination that cable operators have no obligation to carry digital public television stations during the transition, or to carry more than their single main digital program stream (plus program-related material) afterwards. Like Section 614, it limits cable's carriage obligation to a public television station's "primary video, accompanying audio, and line 21 closed caption transmission of each qualified noncommercial educational television station whose signal is carried on the cable system …."[3]

To the extent Sections 615 and 614 do differ, the differences undermine, rather than support, Public Television's argument. While Section 614 expressly authorizes the FCC to establish new rules to address carriage of a commercial television station's digital signal once the analog signal has "been changed," no such authorization can be found in Section 615. In fact, the statute is completely silent on digital carriage rights for non-commercial television stations. Thus, contrary to Public Television's assertion, Congress evidenced no intent in Section 615 to expand carriage rights for PTV stations by virtue of their transition to digital technology.

Public Television also tries to bolster its claim through a purported link between copyright and must carry policy – which it calls a "unified federal scheme governing public television that conjoins cable operators' compulsory copyright license rights with mandatory carriage obligations in a way that leads to a market failure for the distribution of noncommercial educational digital broadcast programming if digital must carry rules are absent."[4] But the District of Columbia Circuit nearly two decades ago made clear that there is no such "unified federal scheme." The court in Quincy Cable TV Inc. v. FCC,[5] examined essentially the identical

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[2] Contrary to Public Television's argument, the Commission is not "free to consider crafting digital carriage rules for public television that are based on public television's distinctive statutory treatment and its unique purposes, means of support and method of operation." Letter at 7. As Professor Laurence Tribe explained in his recent ex parte filing on behalf of NCTA, "without any support from the 1992 Cable Act, a multicast carriage rule would lack a clear congressional mandate and would face insurmountable constitutional hurdles. As the Commission is aware, prior to enactment of the 1992 Cable Act, the Commission's attempts to justify must-carry rules were repeatedly invalidated by the courts." Laurence H. Tribe, "Why the Federal Communications Commission Should Not Adopt a Broad View of the 'Primary Video' Carriage Obligation: A Reply to the Broadcast Organizations," CS Docket No. 98-120 (filed Nov. 24, 2003).

[3] Section 615 (g)(1). Section 615's requirement to carry program-related material, if technically feasible, does differ from the language of Section 614. It is further qualified by the requirement that this material "may be necessary for receipt of programming by handicapped persons or for educational or language purposes." 47 U.S.C. Section 615 (g)(1). But nothing about this provision suggests that Congress meant for this material to encompass separate, digital signals, as opposed to material integrally related to the main program service.

[4] Letter at 4.

[5] 768 F. 2d 1434, 1454 n. 42 (D.C. Cir. 1985).

argument. It found no evidence that, for purposes of the cable compulsory license, the "must-carry rules serve as anything more than a convenient reference point for determining where a local signal ends and a distant signal begins." The subsequent adoption of the 1992 Cable Act did nothing to change that analysis. The Supreme Court in Turner[6] examined in detail the government interests that purported to justify a must carry requirement in 1992, and the cable copyright compulsory license was simply not one of them.[7]

To be sure, Congress recognized the importance of public broadcasting in adopting the 1992 must carry provisions[8] – Section 615 expresses its views on those rights. But the interests Congress sought to advance in the 1992 Cable Act carriage requirements do not support the expanded carriage rights that Public Television now seeks. That interest, as the Supreme Court found, is in preserving the benefits of free over-the-air local broadcasting.[9] The existing analog must carry rules ensure that interest is served. And this interest will continue to be served in the future – once those stations return their analog spectrum to the government and transmit only in digital – when cable operators will switch out analog carriage for carriage of each qualified station's primary digital signal.

Public Television also argues that without mandatory digital carriage during the transition, "[t]he federal, state and local funds committed to upgrade public television stations in anticipation of providing such services on a widespread basis will have been wasted."[10] Costs incurred by broadcasters in making the digital transition cannot justify imposing costs on the cable industry (which has invested billions of dollars of private risk capital to fund its own digital transition). Nor is Public Television's claim strengthened by the argument that in some cases these government funds were procured based on the PTV station's anticipated "widespread distribution" of their digital services. The FCC over three years ago decided that digital cable carriage was not mandated by the Cable Act until broadcasters return their analog spectrum to the government. If funding was sought by Public Television on the basis that dual carriage was mandated prior to the transition, then that is a problem of public television's own making.

But, as a practical matter, many viewers can see public television stations' digital programming by virtue of voluntary carriage agreements that cable operators have entered into with PTV stations. In addition to its availability over-the-air, cable systems carry public television stations' digital signals in an increasing number of instances. As of December 1, 2003, at least one public television station was being carried in 64 markets. Cable operators carried a total of 66 different digital PBS stations nationwide. And in many cases those carriage

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6 Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997).

7 It is hard to see how Public Television's inability to exercise retransmission consent – the right to withhold its signal from cable – justifies giving it the right to insist that cable operators carry programming that they would otherwise choose not to carry.

8 See Letter at 5-6.

9 Turner Broadcasting System, 520 U.S. at 193.

10 Letter at 6-7.

arrangements included carriage of multicast digital PBS services. There is every reason to expect these voluntary arrangements to continue to increase as public television's digital programming expands and as more PTV stations initiate digital broadcasts.

Public Television also cites to its local ownership and educational program content as a further reason for forcing carriage. But these are not legitimate reasons for favoring PTV over any other type of service, including educational and locally owned and produced cable channels.[11] The Supreme Court made clear that Congress did not intend through must carry "to force programming of a 'local' or 'educational' content on cable subscribers."[12] Indeed, had "localism" been the reason for must carry, the law would have been found to be content-based and therefore subject to strict scrutiny.[13]

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[11] Public Television also claims digital carriage would promote diversity. However, granting additional rights to the same broadcaster would disserve this interest. See, e.g., Ex Parte letter dated Nov. 18, 2003 from Discovery Communications (mandating carriage of multicast digital services would "multiply the speech of broadcasters that already have guaranteed access to viewers at the expense of independent programmers like Discovery.")

[12] Turner Broadcasting System, 512 U.S. at 648.

[13] Public Television's citation to Time Warner Entertainment Co., LP v. FCC, 93 F.3d 957, 976-977 (D.C.Cir. 1996) does not compel a different conclusion. The D.C. Circuit there upheld the DBS requirement to set aside capacity for "noncommercial programming of an educational or informational nature." The D. C. Circuit reached its decision, over First Amendment objection, based on application of a "less rigorous standard of First Amendment scrutiny' applied to broadcasters." Id. at 975. That standard does not apply to intrusions on cable, as the Supreme Court made clear: "in light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in Red Lion and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation." Turner Broadcasting System, 512 U.S. at 639.

In short, Public Television cannot make the case that the FCC has authority to mandate dual or multicast digital cable carriage.

Respectfully submitted,

/s/ Daniel L. Brenner

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